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NOTES.

STATUTORY DECLARATIONS OF PUBLIC NUISANCE.—As an incident of the recrudescence of administrative law and personal government during the past half century,[1] there is to be noted a vast number of statutes

[1]Pound, Justice According to Law, 14 Columbia Law Rev. 12-26; The Revival of Personal Government, Proceedings of the Bar Ass'n. of N. H., 1917, 13.

declarative of nuisances[2] and variously designating the particular subject-matter as "nuisance", "public nuisance", "common nuisance", "public menace",[3] or "public pest".[4] Yet the same evils had customarily been legislated against as being unlawful, forbidden or misdemeanors or attacked under the common law of public nuisance, without the avail of a statutory declaration of a nuisance.[5]

The advantages which have urged statutory declarations of nuisance have been the numerous flexible forms of action which the law makes available for the abatement of a nuisance. As to procedures,[6] there are:

[2]For example: Encroachment on public lands, Mass. Rev. Laws 1902, c. 53 § 1, or waters, *id.* c. 196 § 24, Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 1435. General conservation of natural resources:—Howell's Mich. Stat. (2nd ed.) § 4297, N. M. Stat. 1915, § 247, Vernon's Sayles' Tex. Civ. Stat. 1914, Art. 5011h (uncapped artesian wells); Deering Gen. Laws Cal. 1915, Act. No. 23476, Gen. Stat. Minn. 1913, § 5167, Comp. Laws N. D. 1913, § 623 (noxious weeds); Sess. Laws Minn. 1917, c. 252 § 1, Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 1434 (fish nets, boats *etc.* used unlawfully); id. 1422 (unlicensed game park); Laws Wash. 1917, c. 105 § 3 (unguarded fire on forest land); Gen. Laws Ore. 1911, c. 278 § 5 (forest without adequate fire protection); 1 Idaho Rev. Code § 1315, 1 Comp. Stat. N. J. 33, N. M. Ann. Stat. 1915, § 2730 (diseased plants); Pub. Laws R. I. 1917, c. 1540 § 1 (plant diseases); Rev. Stat. Me. 1916, c. 38 § 1; Pub. Stat. N. H. Supp. 25 (gypsy moth); Fla. Comp. Laws 1914, § 3689 (diseased animals); Sess. Laws Alaska 1913, c. 81 (pollution of waters); Deering Gen. Laws Cal. 1915, Act. No. 4368 (moored house-boats). Buildings used for:—Rev. Stat. Ariz. 1913, Civ. Code § 4340, Laws Me. 1917, c. 155 § 3 (bawdy house), Sess. Laws S. D. 1917, c. 281 § 65, Laws Utah 1917, c. 2 § 10 (saloons); Comp. Stat. N. D. 1913, § 10177 (opium smoking); Rev. Stat. Me. 1916, c. 23 § 9 (manufacture of powder); Mass. Rev. Laws 1902, c. 101 § 12 (gambling); Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 327 (institutions which maltreat children). Protection of health:—Fla. Comp. Laws 1914, § 3691, Rev. Stat. Mo. 1909, § 4797 (unclean slaughter house); Jones & Add. Ill. Stat. 1913, § 10802 (building and apparatus used in unsanitary preparation of food); Cal. Stat. 1909, 311 (property infested with rats); Mill's Ann. Stat. Colo. (Rev. ed.) 1912, 6 (adulterated foods); Fla. Comp. Laws 1914, § 3688 (keeping hogs in city); Laws N. Y. 1916, c. 408 (water where mosquitoes breed); Mass. Rev. Laws 1902, c. 102 § 122, Laws Mo. 1915, 364 (emission of dense smoke). Safety:—Page & Adams Ann. Ohio Gen. Code § 1002-1 (factory without safety devices); Mass. Rev. Laws 1902, c. 101 § 1 (burned building); Rev. Stat. Me. 1916, c. 30 § 41, Hogg W. Va. Code 1913, § 791 (buildings without fire escapes). Protection of morals:—Laws Hawaii 1915, 272 (publishing obscene books); N. Y. Consol. Laws 1909, 2663 (horse racing for betting); *id.* 2708 (lottery). Esthetics:—Deering Gen. Laws Cal. 1915, Act No. 52 § 4, Mass. Rev. Laws 1902, c. 208 § 155, 3 Purdon's Dig. Penna. (13th ed.) 3334 (signs and posters). Miscellaneous:—Gen. Stat. Minn. 1913, § 6055 (dogs that habitually chase teams); Jones & Add. Ill. Stat. Ann. 1913, § 9634 (willow trees planted alongside highways); *id.* § 9997 (person camping alongside highway).

[3]Laws Maine, 1917, c. 178.

[4]Laws New Hampshire, 1917, c. 187, § 4.

[5]See, general indexes to statutes of California, New York and other states under such titles as "Crimes" and "Misdemeanors", for such declarations of unlawfulness and misdemeanors; 1 Wood, Nuisance (3rd ed.) c. 2, for public nuisances at common law. *Cf.* Freund, Standards of American Legislation, 65-68.

[6]A somewhat similar terminology in which "method of execution" is used for "procedure" and "means of execution" for "ultimate device", is made use of in Goodnow, Principles of the Administrative Law of the United States, 346-369.

(1) Criminal court procedure instituted by an indictment brought by the state[7] and resulting in a judgment imposing a penalty on the person or directing action against a *res*;[8] (2) Equity proceedings instituted by a bill for an injunction[9] brought by the state or a private party[10] and resulting in a decree binding the person or directing action against a *res*;[11] (3) Administrative proceedings[12] resulting in an order to the person[13] or summary administrative action against a *res*;[14] (4) Direct action by an individual against a *res* in which, of course, no procedure is involved.[15] As to the ultimate devices, all manner of them have been applied,—fine and imprisonment to the person; destruction or sale of property, its deportation, closing or vacating of buildings, rehabilitation and placing in a lawful condition, and quarantine to a *res*.[16] The employment of this extraordinary group of procedures and ultimate devices against nuisances having become familiar and customary to the courts, naturally has been extended to those nuisances declared to be such by statute. Consequently, when in accord with modern tendencies, the responsibility for instituting abatement proceedings for either common law or statutory public nuisances is placed upon an administrative officer or body, such officer has concentrated

[7]Waters *v.* Newark (1894) 56 N. J. L. 361, 363.

[8]1 Hawkins, Pleas of the Crown (Curwood's ed.) 695 § 15; 2 Wood, *op. cit.* § 864; Barclay *v.* Commonwealth (1855) 25 Pa. 503; Wright *v.* State (1914) 130 Tenn. 279, 282, 170 S. W. 57.

[9]Waterman's Eden, Injunctions (3rd ed.) *262-3; State *v.* Mayor of Mobile (Ala. 1837) 5 Porter 279, 312; 7 Columbia Law Rev. 357. *Cf.* 8 Illinois Law Rev. 19; State *v.* Ehrlick (1909) 65 W. Va. 700, 64 S. E. 935.

[10]At common law an individual could not bring a private action to enjoin a public nuisance unless he could show special injury to himself, *i. e.*, the public nuisance was also a private nuisance to him. But under statutes providing for the institution of injunction proceedings by private individuals, many courts affirm the right without discussing the question of special injury. Carleton *v.* Rugg (1888) 149 Mass. 550, 22 N. E. 55; Davis *v.* Auld (1902) 96 Me. 559, 53 Atl. 118. A few jurisdictions sustain statutes permitting the individual to sue on relation to the attorney-general on the theory that the individual represents the public and a public officer need show no injury. Littleton *v.* Fritz (1885) 65 Iowa 488, 496, 22 N. W. 641; State *ex rel.* Martin *v.* Bradley (1901) 10 N. D. 157, 86 N. W. 354.

[11]Laws Me. 1917, c. 155.

[12]Parker & Worthington, Public Health & Safety, § 232.

[13]Queen *v.* Llewellyn (1884) 13 Q. B. D. 681.

[14]Lawton *v.* Steel (1894) 152 U. S. 133, 14 Sup. Ct. 499.

[15]1 Bishop, New Criminal Law (8th ed.) §§ 1080, n. 2, 1081; Meeker *v.* Van Rensselaer (N. Y. 1836) 15 Wend. 397.

[16]For recent statutory illustrations of various ultimate devices besides fine and imprisonment, see:—N. Y. Consol. Laws 1909, Labor Law § 113a (Compulsory medical treatment of persons); Sess. Laws Idaho 1917, c. 45; 34 Stat. 771, 8 U. S. Comp. Stat. 1916 § 8726 (sale); Sess. Laws Minn. 1917, c. 469 (destruction); N. Y. Consol. Laws 1909, Labor Law § 81 (tagging dangerous machines); Laws N. H. 1917, c. 150, § 4 (labeling eggs); Laws Md. S. S. 1917, c. 36, § 106a-b-c (repairing buildings); Laws Neb. 1917, c. 159 § 3 (dipping cattle); Laws Colo. 1917, c. 131, §§ 3, 4 (fumigating plants); Laws N. H. 1917, c. 12, § 1 (removal of brush); Gen. Acts Mass. 1917, c. 208, § 10 (publicity); Laws Neb. 1917, c. 187, § 32 (closing up building); N. Y. Consol. Laws 1909, Tenement House Law § 122 (vacating building); 2 Comp. Stat. N. J. 2520 (liberating fish); Sess. Laws S. D. 1917, c. 361, § 13 (quarantine).

in his hands the most drastic methods of enforcement that the law can give.

The preceding outline of procedures and ultimate devices would seem also to suggest the reason for such difficulties in the definition of "public nuisance" as Mr. Bishop experienced when he accused the English language of not possessing a suitable supply of "words to express the idea exactly, comprehensively, in a single sentence, and in a way fully to satisfy legal criticism".[17] A determination that a nuisance exists or a legislative declaration of nuisance merely makes possible the use of the above groups of procedure and ultimate devices, just as a declaration of felony and misdemeanor demands the use of a criminal court procedure and fine or imprisonment. The same public offense may be both a crime and a nuisance, while the particular denomination serves to designate the mode of attack that the law sanctions for the particular offense.[18] But it appears clear that the subject-matter of nuisance was never limited, as the older writers indicated, to an offense by a person,[19] *i. e.,* the act of committing a nuisance, but includes physical property in itself injurious, and conditions or states of being the existence or continuance of which is injurious to the public. Neither of these latter involves the element of personal responsibility. Each is here described by the term *res.* Any of the procedures above outlined is capable of an action *in rem* directed against a *res* instead of the person responsible for a nuisance, and the declaration of nuisance makes possible the use of these procedures and ultimate devices in abating a *res* as well as an offense. So any particular offense or *res,* injurious to the public, may be abated as a public nuisance, provided that it is declared by statute to be such.[20] Thus the category of nuisance may be broadened indefinitely[21] so long as it is shown that the particular procedure and ultimate devices employed are reasonably necessary to the accomplishment of the legislative purpose,[22] and may be sustained on the same grounds as any other exercise of the police power.[23]

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[17]1 Bishop, *op. cit.* § 1072 n. 4.

[18]Both crimes and nuisances are usually classified by text writers under the same heading, public wrongs, with little sensible differences in definition. See 4 Bl. Comm. 5, 166; 1 Bishop, *op. cit.* §§ 32, 1072 (1).

[19]1 Hawkins, *op. cit.* 692; 4 Bl. Comm. 166.

[20]Legislatures may declare new species of nuisances not known at common law. Lawton *v.* Steel (1890) 119 N. Y. 226, 23 N. E. 878; State *v.* Tower (1904) 185 Mo. 79, 84 S. W. 10; Mugler *v.* Kansas (1887) 123 U. S. 623, 8 Sup. Ct. 273.

[21]*Cf.* the statement of Kenshaw, *J.,* "it would tax the acumen of the wisest body of lawmakers to describe with particularity every act the doing of which, in our complicated civilization, would constitute a nuisance." People *v.* Lee (1895) 107 Cal. 477, 481, 40 Pac. 754.

[22]State *ex rel.* Wilcox *v.* Ryder (1914) 126 Minn. 95, 107, 147 N. W. 953, 958.

[23]Lawton *v.* Steel, *supra,* footnotes 14 and 20; Train *v.* Boston Disinfection Co. (1887) 144 Mass. 523, 11 N. E. 929; Moses *v.* United States (1900) 16 App. D. C. 428; Mugler *v.* Kansas, *supra*; *cf.* Quintini *v.* City of Bay St. Louis (1887) 64 Miss. 483, 1 So. 625. Some courts have gone to the extreme of stating that it is not competent to introduce evidence to show that a nuisance declared to be so by statute is not so in fact. Train *v.* Boston Disinfecting Co., *supra*; Watertown *v.* Mayo (1872) 109 Mass. 315; Carleton *v.* Rugg, *supra*; Stead *v.* Fortner (1912) 255 Ill. 468, 99 N. E. 680; Goodnow, *op. cit.* 352; *cf.* Harrington *v.* Providence (1897) 20 R. I. 233, 38 Atl. 1.

Consequently, in the recent case of *Eccles* v. *Ditto* (N. Mex. 1917) 167 Pac. 726,[24] the court found no difficulty in approving a statutory addition to the list of public nuisances,—that of an unsecurely capped artesian well.

It is customary for statutory declarations of nuisances to designate physical property as the nuisance.[25] But if the property is not injurious in itself,[26] then it is no nuisance in fact, but has served as a convenient method of designating the real nuisance, the acts or conditions involving the employment of such property. Property has a value to society as a whole, and the law of nuisance in its refusal to permit excess abatement well illustrates the tendency of the law to preserve that value. Consequently innocent property may not be destroyed in the abatement of a nuisance,[27] not even if the statutory declaration designates such property as the nuisance. In *State ex rel McCurdy* v. *Bennett*[28] the court, though given by statute the power to dispose of the furnishings of a disorderly house, held that it had no power to destroy such property but only to detain it during the one year period in which the house was to be closed.[29] It would seem to follow that no ultimate device may be employed when one less drastic would serve

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[24]See also *Ex parte* Elam (1907) 6 Cal. App. 233, 91 Pac. 811; 12 Illinois Law Rev. 152.

[25]See footnote 2, *supra*.

[26]Remnants of Puritanism have prevented the recognition of gambling apparatus as innocent property. Mullen & Co. *v.* Moseley (1907) 13 Idaho 157, 90 Pac. 986; Garland Novelty Co. *v.* State (1902) 71 Ark. 138, 71 S. W. 257. For examples of property entirely harmful or of but little lawful commercial value see:—38 Stat. 194, 6 U. S. Comp. Stat. 1916, §§ 5299, 5301 (obscene books); Sess. Laws S. D. 1917, c. 361, § 16 (tubercular cow); Laws Mo. 1917, 133 § 2 (carcass of a diseased hog); Laws Pa. 1917, No. 236, § 10 (diseased plants); Sess. Laws Idaho 1917, c. 132, § 3 (noxious weeds); Adams *v.* City of Milwaukee (1913) 228 U. S. 572, 577n. (milk from untested cows); Sess. Laws Minn. 1917, c. 469 (building in dangerous condition, but not the materials after it is torn down).

[27]Barclay *v.* Commonwealth, *supra*; Wright *v.* State, *supra*; Bloomhuff *v.* State (Ind. 1846) 8 Black. *204; Ely *v.* Board of Supervisors (1867) 36 N. Y. 297; Welsh *v.* Stowell (Mich. 1849) 2 Doug. 332; State *v.* Paul (1858) 5 R. I. 185; Miller *v.* Burch (1869) 32 Tex. 208; Earp *v.* Lee (1873) 71 Ill. 193; 19 Cent. L. J. 42, 44. Statutes often avoid the destruction of innocent property by requiring the removal and sale of chattels or the closing up of buildings. State *ex rel.* Robertson *v.* New England, *etc.* Co. (1914) 126 Minn. 78, 147 N. W. 951.

[28](N. D. 1917) 163 N. W. 1063.

[29]A statute providing that such property be seized and sold is valid, State *ex rel.* Thrasher *v.* Smith (1915) 275 Ill. 256, 114 N. E. 31; State *ex rel.* Kern *v.* Jerome (1914) 80 Wash. 261, 141 Pac. 753; People *ex rel.* Bradford *v.* Barbiere (Cal. 1917) 166 Pac. 812, even though the owner is an innocent party. State *ex rel.* Robertson *v.* New England, *etc.* Co., *supra*; *cf.* Comp. Laws N. D. 1913, § 9646. Of course depriving the public of the use of a building in a lawful manner would seem to be destroying a valuable property right of the public, but closing a building used for a saloon or disorderly house for a reasonable period, as one year, has been repeatedly sustained, as valid action. See cases *supra* and the recent case of People *v.* Casa Co. (Cal. 1918) 169 Pac. 454.

to abate the injury to the public,[30] and so *Eccles* v. *Ditto*[31] declares that wastage of water should not be stopped by repairing the artesian well if the facts show that plugging would suffice. Two exceptions, however, exist to this principle of the conservation of the social value of property: when the value of property is small and the loss to society by its destruction would be relatively unimportant as compared with the expense of removal and sale,[32] and also when property forms a link in the continuance or spread of a dangerous condition or is necessary to the prevention of a danger.[33] In either case destruction is a permissible ultimate device.

Further, declarations that associated physical property is the nuisance, when in fact the nuisance is far broader in scope, often make it impossible to take satisfactory abatement measures. Thus, where the white pine blister rust is devastating the eastern forests, a declaration that infested trees are a nuisance[34] would not suffice, for this would limit abatement measures to the infested trees only. But upon a declaration that the disease itself is a nuisance[35] a much wider range of action would probably be permitted, and it is believed that the destruction of infested and undiseased trees in order to prevent the spread of the fungus, quarantine of plant and lumber shipments, and the fumigation of plant stock and lumber products, would be some of the available ultimate devices.

The law of nuisance aided by statutory declarations has already gone a great way toward covering the entire field of police regulation and providing for the greatest possible flexibility and effectiveness in enforcing legislative policies. Its future limitations lie in the legislative and administrative ability to choose the proper procedures and ultimate devices for the particular problem and in an avoidance of the current practice of designating, by a sort of legal synecdoche, innocent property as the nuisance. That the courts have done their part and taken an unusually liberal attitude towards the statutes involved[36] has made possible swift advance in the administration and enforcement of much of the field of police legislation.

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[30]Eckhardt *v.* City of Buffalo (1897) 19 App. Div. 1, 46 N. Y. Supp. 204, 210; People *v.* High Ground Dairy Co. (1915) 166 App. Div. 81, 151 N. Y. Supp. 710; State *v.* Schaefer (1906) 45 Wash. 9, 87 Pac. 949; Finley *v.* Hersey (1875) 41 Iowa 389; Shiras *v.* Olinger (1879) 50 Iowa 571; *cf.* People *v.* Weiner (1915) 275 Ill. 274, 110 N. E. 871; Inhabitants of Belmont *v.* New England Brick Co. (1906) 190 Mass. 442, 77 N. E. 504, and the recent case of Inhabitants of Skowhegan *v.* Heselton (Me. 1917) 102 Atl. 772. Laws Utah 1917, c. 2 § 18; Sess. Laws Minn. 1917, c. 252.

[31]*Supra,* at p. 730.

[32]Lawton *v.* Steel, *supra,* footnote 20; *cf.* Nelson *v.* City of Minneapolis (1910) 112 Minn. 16, 23, 127 N. W. 455; Ross *v.* Desha Levee Board (1907) 83 Ark. 176, 103 S. W. 380.

[33]*Cf.* Cases of the King's Prerogative in Salt-Petre (1777) 7 Coke *12; Pub. Laws R. I. 1917, c. 1540 § 4; Laws Neb. 1917, c. 1; Gen. Acts. Mass. 1917, c. 121, § 1.

[34]Sess. Laws Idaho 1917, c. 141; Pub. Laws R. I. 1917, c. 1540, § 1; Pub. Acts. N. H. 1917, c. 187, § 1; Laws Me. 1917, c. 178, § 1.

[35]For similar declarations of conditions as nuisances, in connection with housing acts see Stat. Cal., 1917, c. 736, § 10; Sess. Laws Minn. 1917, c. 137, § 2 (18); Pub. Acts. Mich. No. 167, § 2.

[36]*Cf.* Pound, Common Law & Legislation, 21 Harvard Law Rev. 383.